IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

* * *

NO. 77-269

* * *

SIMMIE LYNN McCALL and BILLY DON MILLS,

Petitioners

V.

THE STATE OF TEXAS,

Respondent

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

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OPINION BELOW

The Texas Court of Criminal Appeals affirmed Petitioners' conviction in a per curiam opinion rendered May 18, 1977, a copy of which is attached to this Brief in Opposition as Appendix "A".

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

The questions presented for review before this Court, including those issues raised in Petitioners' Arguments and Authorities but not set out in his original list of

issues presented, should be stated as follows:

(1) Did the trial court correctly instruct the jury in the proper method by which a determination of the punishment to be assessed could be made?

(2) Did the prosecutor impermissibly withold exculpatory statements from defense councel?

(3) Did the Court below correctly hold that petitioners were not denied the effective assistance of retained counsel in their 1976 conviction?

(4) Did the jury engage in impermissible conduct in assessing petitioners' punishment in their 1976 conviction?

(5) Did the trial court err in failing to instruct the jury on intoxication as a defensive theory in mitigation of punishment?

(6) Did the prosecutor commit reversible error when he argued to the jury that probation was privilege rather than a right?

(7) Did the prosecutor impermissibly refer to the defendant's failure to testify in his closing arguments?

(8) Did the trial court incorrectly advise the jury that it had discretion to make as a condition of probation that the defendant commit no crimes against the laws of Texas or the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners rely on the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioners Simmie Lynn McCall and Bill Don Mills were convicted of burglary of a building and burglary of a motor vehicle upon a plea of guilty before a jury on February 11, 1976 in the 89th Judicial District Court of Wichita County, Texas. The Texas Court of Criminal Appeals affirmed the conviction in a per curiam opinion delivered May 18, 1977. Petitioners then filed this Petition for Writ of Certiorari.

ARGUMENTS AND AUTHORITIES

I

THE TRIAL COURT'S ERROR IN INSTRUCTING THE JURY THAT THEY COULD DETERMINE THE PUNISHMENT TO BE ASSESSED BY "LOT, CHANCE, OR ANY OTHER METHOD" OTHER THAN THE UNANIMOUS DECISION OF THE JURY WAS HARMLESS ERROR.

(a) Petitioners contend that Federal Constitutional error occurred when the trial judge orally instructed the jury that:

> "...It will be proper for you in determining the punishment to be assessed to fix the same by lot, chance, or any other method than by a full, fair and free exercise of the opinion of the individual jurors, under the evidence admitted before you."
>
> (Record on Appeal: Arguments to the Jury, p. 3, lines 1-5)

It is Petitioners' contention that such an instruction failed to require Jury unanimity and thus violated the

mandate of *In Re Winship*, 397 U.S. 358 (1970).

However, Petitioners overlook the fact that the trial judge correctly instructed the jury that their verdict had to be unanimous. (Record on Appeal: Arguments to the Jury, p.5, Lines 13-15). Additionally, written copies of the trial Judge's instructions were taken into the jury room. These instructions correctly charged:

> "...it will not be proper for you in determining the punishment to be assessed to fix the same by lot, chance or any other matter than by full, fair, and free exercise of the opinion of the individual jurors..."
>
> (Record on Appeal: Transcript, p. 25).

During the hearing on Petitioners' Motion for New Trial, a juror testified that during their deliverations, the jurors took "every one of the charges down the line." (Record on Appeal: Volume 2, p. 124, line 27).

Petitioners have failed to demonstrate how they were harmed by what appears to be either the trial judge's apparent slip of the tongue or an error in transcription. There were no statements from any of the jurors called to testify on Petitioners' Motion for New Trial that the punishment they assessed was determined by lot or chance or any other method than by their unanimous decision.

Petitioners have completely failed to establish that the technical error complained of in any way affected the fundamental fairness of their plea of guilty before the jury. Petitioners have failed to show prejudice. *See Generally, Finley v. United States* 271 F.2d 777 (5th Cir.), *cert. denied* 361 U.S. 870 (1959).

(b) Petitioners claim fundamental error in the trial

judge's instruction to the jury regarding their use of lot or chance. Petitioners did not raise this ground on direct appeal from conviction. *See*, Appendix "A". The failure to do so constitutes an inexcusable procedural default barring relief herein. *Wainwright v. Sykes*, ____U.S.____ (1977), 97 S.Ct. 2497; *Loud v. Estelle*, No. 76-3042, _____F.2d_____ (5th Cir., August 5, 1977).

II.

THE PROSECUTOR DID NOT WITHHOLD EXCULPATORY STATEMENTS FROM DEFENSE COUNSEL.

Petitioners contend the prosecutor suppressed an exculpatory statement by Larry Fugett in violation of *United States v. Agurs*, 427 U.S. 97 (1976). The record before this Court does not support that contention.[1]

At the hearing on Petitioners' Motion for New Trial, trial counsel testified that he was unaware of the complained of second statement by Fugett. (Record on Appeal, Vol. II, p. 86, line 24). He further testified that the district attorney allowed him to persue his entire file without the necessity of filing a pretrial motion. It was trial counsel's opinion that the statement by Fuget contained in the file was not exculpatory when read in its entirety.

The district attorney also testified in petitioners' Motion for New Trial hearing. He stated that he had turned his entire file over to the Petitioners' defense

[1]There are apparently two statements at issue here. The first statement is typewritten, dated December 18, 1975, and was made while Fugett was under arrest. That statement implicates Billy Don Mills as a lookout and Simmie Lynn McCall as the person actually in the automobile. The second statement is handwritten by Fuget and dated February 20, 1976. The second statement witnessed by an investigator employed by defense counsel on motion for new hearing, recites that Fuget informed the District Attorney that Mills had "nothing to do with what happened".

counsel before trial and that he had never seen the handwritten statement in question, nor was he familiar with its contents until the motions had been filed.

After a lengthy cross-examination and admonishments by the trial court, Larry Fuget testified at the Motion for New Trial hearing that the statement given by him on December 18, 1975 was the corect statement and that the second statement, given to an investigator for appellants' counsel, was untrue.

Thus here is a situation where both the district attorney and trial counsel state that the district attorney's files were made available to the defense. The district attorney denies being aware of the nature of the second statement. These facts certainly do not amount to a withholding by the district attorney of exculpatory evidence as condemned by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

III.
THE COURT BELOW CORRECTLY HELD THAT PETITIONERS' RETAINED COUNSEL WAS EFFECTIVE

Petitioners would have this court reverse their convictions for their trial attorney's alleged failure to protect certain well recognized constitutional rights. As examples of this failure, Petitioners cite to defense counsel's failure to object to jury argument by the state's attorney which petitioners claim violated the standards of *Griffin v. California*, 380 U.S. 609 (1965). Petitioners also assign error to defense counsels failure to call key witnesses to establish diminished capacity to form the specific intent necessary to commit burglary.

This case involved a guilty plea by both petitioners with a jury chosen to assess punishment. The Texas Court of Criminal Appeals correctly stated in its affirmance that:

> "We have carefully examined the record and Appellants numerous allegations and cannot conclude that there was ineffective assistance of counsel. This record does not support or reflect any willful misconduct by an employed counsel without Appellants' knowledge which amounts to a breach of a legal duty of an attorney...even if we used the "reasonably effective assistance" standard...we would reach the same results." (Appendix "A")

As noted by the court below, the fact that other counsel might have tried the case differently does not show inadequate representation. *United States v. Rodriquez*, 498 F.2d 302 (5th Cir. 1974).

Respondent contends Petitioners' retained counsel rendered reasonably effective assistance as required by *Fitzgerald v. Estelle*, 505 F.2d 1334 (5th Cir.), *cert denied* 422 U.S. 1011 (1975). Failure to make a particular objection may have been a result of trial strategy as well as any other reasonable explanation. Certainly it does not suffice to illustrate incompetence or ineffective assistance. Similarly, trial counsel's failure to call expert witnesses on intoxication, in light of much trial testimony that although the defendants had been drinking they appeared coherent and mobile, fails to rise to the level of ineffective assistance. Trial counsel's decision not to call expert witnesses could have been a tactical move based on the expected benefit to be gained from such testimony balanced against its cost to the two young petitioners.

Reasonably effective assistance is an easier standard to meet in the context of a guilty plea than in a trial. *Herring v. Estelle* 491 F.2d 125, 128 (5th Cir. 1974). Here Petitioners have made no claim that trial counsel failed to ascertain if their plea was entered voluntarily and knowingly. Neither do they claim that trial counsel

failed to actually and substantially assist them in deciding whether to plead guilty. *Herring, supra.* Petitioners' disagreement with their retained counsel on a guilty plea because of differences of opinions on trial tactics, falls far short of a lack of fundamental fairness or a failure to render reasonably effective assistance.

IV.

THE COURT BELOW USED THE CORRECT STANDARD IN REVIEWING THE EFFECTIVENESS OF PETITIONERS' COUNSEL.

Petitioners assert that the Texas Court of Criminal Appeals used the wrong standard in reviewing the effectiveness of their retained trial counsel. Petitioners are troubled by language in the state court's opinion dealing with "willful misconduct" and "bad faith, insincerity, or disloyalty toward Appellants by their attorney." *See* Appendix "A".

Respondent answers that the Texas Court of Criminal Appeals found trial counsel's representation of Petitioners to be adequate under two standards. The Court below looked at the record under both a breach of legal duty and a reasonably effective assistance standard. In *Fitzgerald v. Estelle, supra,* the United States Court of Appeals for the Fifth Circuit noted in a footnote at 1337:

> "Putting to one side the fact that the District Judge had the right to and did determine in denying the Motion for New Trial, that the Defendants had not shown that they had had any material witnesses who would have been assistance to them and whose names they gave to their trial counsel and that they had refused to call them, we think it basic to the claim of

> relief, since Defendants were represented by their own employed trial counsel, they may not assign as error that the mistakes or errors of their counsel constituted unfair trial, and that, *without a showing of a deliberate purpose on the part of counsel to prevent Defendants from obtaining a fair trial,* or actions so grossly negligent as to amount to substantially the same thing, Defendants cannot relieve themselves of the errors, mistakes or misjudgments of their counsel by having the trial set aside." (Emphasis added).

Based on the underscored language cited above, the Texas Court of Criminal Appeals correctly reviewed the record on appeal to determine if there were any instances of willful misconduct by Petitioners' attorney. The Court below then examined the record to determine if it would support a finding of reasonably effective assistance in light of Petitioners' numerous allegations of ineffective representation. Under either test, the Texas Court of Criminal Appeals correctly held that Petitioners had adequate representation in the trial court and were not deprived of either a fair trial or due process of law.

V.

THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO MERIT IN PETITIONERS' CLAIM OF JURY MISCONDUCT.

Petitioners give examples of three alleged acts of misconduct by the jurors in their case which they claim warrants reversal of their conviction: (1) discussing that the defendants did not testify in their own behalf; (2)

talking to persons in the halls contrary to the court's instruction; (3) determining or potentially determining the penalties assessed by lot or chance.

Respondent notes that there was no testimony at the Motion for New Trial hearing from any of the jurors that petitioners' punishments were assessed by lot or chance. Furthermore, although there was some conflicting testimony as to whether or not the fact that the defendants did not testify in their own behalf was mentioned in the jury room, no juror testified that this was ever discussed by the group as a whole or that the defendants' failure to testify had any substantial impact on their decision.

The Texas Court of Criminal Appeals noted in its affirming per curiam opinion on direct appeal from conviction that most of the testimony of alleged jury misconduct developed at petitioners' hearing on their Motion for New Trial was either contradictory to their allegations or conflicting. The lower court also noted that under Texas law when the evidence is conflicting as to alleged jury misconduct, the ruling of the trial court on the Motion for New Trial is ordinarilly conclusive for appeal purposes. *See Williams v. State* 481 S.W.2d 119 (Tex. Crim. Ap. 1972).

Petitioners' have failed to present this court with an alleged error which raises a federal question. An allegation of jury misconduct does not rise to constitutional dimensions. *Hinajas v. Black*, 462 F.2d 621 (9th Cir.), *cert denied* 409 U.S. 1126 (1973).

VI.

THE COURT BELOW CORRECTLY HELD THAT THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON

A DEFENSIVE THEORY OF INTOXICATION.N.

Petitioners contend that the trial court should have given an instruction to the jury of a defensive theory of intoxication as mitigation of punishment under V.T.C.A., Penal Code, Section 8.04 A, B, C and D. (See Appendix "B"). This contention was rejected by the Texas Court of Criminal Appeals which found that there was no evidence raising the issue of temporary insanity by reason of intoxication.

Respondent asserts that the Court below properly applied the applicable Texas law when it held that in order for an instruction to be given pursuant to Section 8.04 *supra*, it must be shown that as a result of intoxication a Defendant (1) "does not know his conduct is wrong," or (2) "was incapable of confirming his conduct to the requirements of the law he violated." Under Texas law, testimony in the record that a Defendant was or may have been intoxicated is insufficient to raise the issue of temporary insanity. *See* Appendix "A".

Moreover, allegations of improper jury instruction raise no question of constitutional significance unless the error resulted in a miscarriage of justice, as, for example, in impermissibly shifting the burden of proof. *United States ex rel. Standridge v. Zelker*, 514 F.2d 45, 50 (2nd Cir. 1975), *cert. denied* 423 U.S. 872 (1975), citing *Cupp v. Naughten*, 414 U.S. 141 (1973); *DeBerry v. Wolf*, 513 F.2d 1336 (8th Cir. 1975), *Bryan v. Wainwright*, 511 F.2d 644 (5th Cir.), *cert. denied*, 423 U.S. 837 (1975); *Young v. Alabama*, 443 F.2d 854 (5th Cir.), *cert denied*, 405 U.S. 976 (1972); and *Murphy v. Beto*, 416 F.2d 98 (5th Cir. 1969). The failure to charge the jury on the ground presented in this petition is a matter of state law and raises no federal

constitutional question.

VII.

THE PROSECUTOR COMMITTED NO ERROR IN ARGUING TO THE JURY THAT "PROBATION WAS A PRIVILEGE, AND NOT A RIGHT".

Petitioners complained that during this final argument, the prosecutor told the jury:

> "You don't have to give probation. They asked for it. It's a right they have under the statutes. But because they asked for it, don't be mislead and believe you have to give it to them. It is a privilege; not a right."

Petitioners incorrectly argue that *Morrissey v. Brewer*, 408 U.S. 47 (1972) held that due process must be afforded in parole proceedings on the grounds that parole was a privilege rather than a right. Analogzing to *Morrissey v. Brewer*, Petitioners then incorrectly assert that probation is a right, not a privilege under Texas law. However, Petitioners have misinterpreted the holdings of *Morrisesey v. Brewer*. *Morrissey v. Brewer* did not hold that parole (or by analogy, probation) was a matter of right and not a privilege. Rather, *Morrissey v. Brewer* explained that it is no longer useful to consider questions of possible due process deprivations in terms of whether something is a "right" or "privilege".

However, even a correct interpretation of *Morrissey v. Brewer* is irrelevant to Petitioner's complaint.

Furthermore, in the context of the prosecutors argument, his statement was correct. According to Texas statutory law, the recommendation of probation

by a jury, or the granting of a probation of sentence by the trial judge, is a matter of discretion. Article 42.12, Sections 3, 3a, 3b, 3c V.A.C.C.P. Similarly, Texas case law also holds that probation is not granted as a matter of right. *See, Scamardo v. State*, 517 S.W.2d 293 (Tex. Crim. Ap. 1974).

Petitioners assign error to the prosecutor's argument that "probation was a privilege, not a right." However, Petitioner did not raise this ground on direct appeal from conviction. *See*, Appendix "A". Their failure to do so constitutes an inexecusable procedural default barring relief in the instat Petition for Writ of Certiorrair. *Wainwright v. Sykes, supra; Loud v. Estelle, supra.*

VIII.

THE PROSECUTOR'S STATEMENT CONCERNING PETITIONERS' FAILING TO TESTIFY SHOULD NOT CONSTITUTE REVERSIBLE ERROR.

During his final argument to the jury, the state's attorney said:

> "They're not little kids as Mr. Moreau has referred to them, and I hope you have been observing their appearances while they have been tried for very serious cases. They could go to the Texas Department of Corrections. Have they appeared to be too worried to you as they sat here at the table and listened to all of this? They probably think they are going to walk on probation, and nothing they've said."
>
> "You might have wondered why I introduced..."

Respondent agrees that it is error for a prosecutor to comment on a defendant's failure to testify. However, Respondent disagrees with petitioners' contention that the argument before this court warrants reversal of their conviction for two reasons.

First, the prosecutor's argument is ambiguous and unclear at best. The record does not reflect any objection or interruption that would explain the district attorney's failure to complete the complained of sentence. On the face of the record, the thrust and meaning of the prosecutor's argument is uncertain.

It is Respondent's position that error, if any, in the prosecutor's statement was clearly harmless error. The harmless error rule may be applied even in a case such as the one before us where the error is possibly one of constitutional dimension. *Vaccaro v. United States* 461 F.2d 626 (5th Cir. 1972). The instant case involves a guilty plea; the sole function the jury was to perform was an assessment of punishment. In determining whether a complained of jury argument violated federal due process of law, the argument must be "so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the due procees clause of the Fourteenth Amendment." *Alvarez v. Estelle*, 531 F.2d 1319, 1323 (5th Cir. 1976). *See Bergenthal v. Cady*, 466 F.2d 635 (7th Cir.), *cert denied*, 409 U.S. 1109 (1973). Certainly under any interpretation of the argument it is impossible to conclude that the complained of argument, made in the context of a punishment hearing, caused Petitioners to suffer harm of that magnitude.

Additionally, defense counsel's failure to object to the prosecutor's statement as a matter of trial tactic, was sufficient to waive the error. *Poole v. Fitzharris*, 396 F.2d 544 (9th Cir. 1968).

IX.

THE TRIAL JUDGE CORRECTLY CHARGED THE JURY ON THE CONDITIONS OF PROBATION WHICH MAY HAVE BEEN IMPOSED.

Petitioners complain that the trial court charged the jury:

> "The conditions of probation which this court may impose should be limited to but shall not necessarily include all the following:
>
> (1) that he commit no offense against the laws of this state or of any other state or of the United States. (Record on Appeal: Arguments to the Jury, page 4, lines 10-14.)"

It is Petitioners' unique argument that this charge when coupled with the "law and order" arguments of the prosecutor, would leave the jury the impression that if the trial court chose not to include this condition of probation, then the Defendants could commit other crimes and not face probation revocation despite the seriousness of the crime subsequently committed.

Respondent answers that the trial court's charged directly tracted the six statutory provisions of Article 42.12, Section 6, V.A.C.C.P. (attached hereto as Appendix "C") which may be included as terms and conditions of probation.

Respondent further notes that even had the instruction been error under state law, the giving of a bad instruction presents no federal question. *Michael v. Eyman*, 462 F.2d 626 (9th Cir. 1972).

Petitioners claim fundamental error in the trial judge's instruction to the jury on the terms and conditions or probation which could have been imposed. Petitioners did not raise this ground on their direct appeal from conviction. *See* Appendix "A". Their failure to do so bars them from asserting this claim for the first time on this Petition for Writ of Certiorari. *Wainwright v. Sykes, supra.*

CONCLUSION

For the reasons stated above, Respondent-Appellee avers that there has been no denial of Petitioners' constitutional rights. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, JOE B. DIBRELL, Assistant Attorney General of Texas and a Member of the Bar of this Court, hereby certify that a copy of Respondent's Brief in Opposition has been served by placing same in the United States Mail, postage prepaid, certified, return receipt requested, this ____ day of November, 1977, addressed to Attorneys for Petitioners, Mr. Roger S. Hanson, 518 South Broadway, Santa Ana, California 92701; Mr. Ray Gene Smith, 301 Wichita Falls Savings Building, Wichita Falls, Texas and Mr. Scott W. Hudson, 1318 Mercantile Bank Bldg., Dallas, Texas 75201.

Joe B. Dibrell
Assistant Attorney General

APPENDIX A

SIMMIE LYNN McCALL and
BILLY DON MILLS, Appellants

NOS. 54,266 and 54,267, v.

THE STATE OF TEXAS, Appellee

Appeals from Wichita County

OPINION

These are appeals from convictions for the offense of burglary of a building in Cause No. 16792-C and burglary of a motor vehicle in Cause No. 16874-C. Pursuant to appellants' written request the two causes were tried together before a jury upon a plea of guilty. Punishment was assessed in each case at ten years.

Initially appellants contend that they failed to receive a fair trial because of ineffective assistance of their retained counsel in the trial court.

The constitutional right to counsel, whether counsel be appointed or retained, does not mean errorless counsel whose competency or adequacy of his representation is not to be judged ineffective by hindsight. Ex parte Prior, 540 S.W.2d 723 (Tex.Cr.App. 1976); see also, Duran v. State, 305 S.W.2d 863 (Tex.Cr.App. 1974).

The adequacy of an attorney's services must be gauged by the totality of the representation. Ex parte Prior, supra; Williams v. State, 513 S.W.2d 54 (Tex.Cr.App. 1974); Coble v. State, 501 S.W.2d 344 (Tex.Cr.App. 1973). The allegations of ineffective representation will be sustained only if they are firmly founded. Faz v. State, 510 S.W.2d 922 (Tex.Cr.App. 1974). Effectiveness of retained counsel must be gauged by whether or not there is a breach of legal duty. Ex

parte Raley, 528 S.W.2d 257 (Tex.Cr.App. 1975), and cases cited therein.

As this Court wrote in Chapman v. State, 478 S.W.2d 91 (Tex.Cr.App. 1972):

> "...complaints of ineffective counsel must be examined in light of what the Court said in Williams v. Beto, 354 F.2d 698 (5th Cir): 'as no two men can be exactly alike in the practice of the profession, it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight.' "

An attorney must appraise a case and do the best he can with the facts and the fact that other counsel might have tried the case differently does not show inadequate representation. Ex parte Prior, supra. See Rockwood v. State, 524 S.W.2d 292 (Tex.Cr.App. 1975), and Witt v. State, 475 S.W.2d 259 (Tex.Cr.App. 1971). See also, United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974).

We have carefully examined the record and appellants' numerous allegations and cannot conclude there was ineffective assistance of counsel. This record does not support or reflect any wilful misconduct by an employed counsel without appellants' knowledge which amounts to a breach of the legal duty of an attorney. Trotter v. State, 471 S.W.2d 822 (Tex.Cr.App. 1971). Even if we used the "reasonably effective assistance" standard of Ex parte Gallegos, 511 S.W.2d 510 (Tex.Cr.App. 1974), we would reach the same result.

Nothing appears in the record to show any bad faith, insincerity or disloyalty toward appellants by their attorney. A good faith error or mistake, if any, made by retained counsel with honest and earnest purpose to

serve his client cannot be the basis of a claim of reversible error. Mills v. State, 483 S.W.2d 264 (Tex.Cr.App. 1972); see also, Popeko v. United States, 294 F.2d 168 (5th Cir. 1961).

We find that appellants had adequate representation in the trial court. Nor do we conclude that appellants have been deprived of a fair trial or due process of law.

Next, appellants contend that the trial court erred in failing to grant their motion for new trial because of alleged jury misconduct.

Appellants do not cite any authority or present any argument but merely set out part of the testimony of one of eight jurors who testified at the hearing on their motion for new trial. While this ground of error is not in compliance with Article 40.09, Section 9, V.A.C.C.P., we have reviewed the voluminous testimony heard at the hearing and hold that this contention is without merit. The decision of the trial court on passing upon a motion for new trial will not be disturbed by this Court in the absence of an abuse of discretion. Powell v. State, 502 S.W.2d 705 (Tex.Cr.App. 1973). The testimony solicited appears to be an attempt by appellants to develop the mental processes of the jury in arriving at the punishment assessed. This is not allowed. Peak v. State, 522 S.W.2d 907 (Tex.Cr.App. 1975). In fact, most of the testimony is contradictory to appellants' allegations and even conflicting in the juror's testimony set out in their brief as well as the others. Where the evidence is conflicting as to alleged jury misconduct, the ruling of the trial court on the motion for new trial is ordinarily conclusive on appeal. Williams v. State, 481 S.W.2d 119 (Tex.Cr.App. 1972).

Appellants' third ground of error complains of the

admission into evidence during the punishment stage of the trial.

No authority is cited nor is any argument made in support of this ground of error. Since this ground of error is not in compliance with Article 40.09, Section 9, supra, nothing is presented for review. Williams v. State, 504 S.W.2d 477 (Tex.Cr.App. 1974).

Their next complaint is directed toward the trial court's failure to give an instruction to the jury on mitigation of punishment by reason of intoxication in accordance with V.T.C.A., Penal Code, Section 8.04, subsections A, B, C, D and E.

We find no evidence raising the issue of temporary insanity by reason of intoxication. The mere fact that there is testimony that appellants were or may have been intoxicated is insufficient. For an instruction pursuant to Section 8.04, supra, it must be shown that an appellant as a result of intoxication (1) "not know his conduct is wrong", or (2) "was incapable of conforming his conduct to the requirements of the law he violated." Hart v. State, 537 S.W.2d 21 (Tex.Cr.App. 1976). His contention is overruled.

Lastly then complain of improper jury argument by the prosecutor. The record reflects that no objection was made to the complained of comments. Absent an objection, nothing is presented for review.

No reversible error having been shown, the judgments are affirmed.

Per Curiam

(Delivered May 18, 1977)

APPENDIX B

V.T.C.A., Penal Code

§ 8.04. Intoxication

(a) Voluntary intoxication does not constitute a defense to the commission of crime.

(b) Evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried.

(c) When temporary insanity is relied upon as a defense and the evidence tends to show that such insanity was caused by intoxication, the court shall charge the jury in accordance with the provisions of this section.

(d) For pusposes of this section "intoxication" means disturbance of mental or physical capacity resulting from the introduction of any substance in the body.

APPENDIX C

V.A.C.C.P., **Art. 42.12**

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain with a specified place;

h. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine; and

i. Support his dependents.